No. 18-15

In the Supreme Court of the United States

JAMES L. KISOR, PETITIONER,

v.

ROBERT L. WILKIE, SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR NATIONAL VETERANS LEGAL SERVICES PROGRAM, MILITARY ORDER OF THE PURPLE HEART, INC., NATIONAL LAW SCHOOL VETERANS CLINIC CONSORTIUM, PROTECT OUR DEFENDERS, AND SERVICE WOMEN'S ACTION NETWORK AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Amici curiae are the National Veterans Legal Services Program, the Military Order of the Purple Heart, Inc., the National Law School Veterans Clinic Consortium, Protect Our Defenders, and the Service Women's Action Network.

Founded in 1980, the National Veterans Legal Services Program (NVLSP) is a nonprofit organization that works to ensure that the Nation's 25 million veterans and active-duty service members have access to the federal benefits to which their military service entitles them.

NVLSP does so in part by serving as a national support center that recruits, trains, and assists thousands of volunteer lawyers and veterans' advocates. For the last 18 years, NVLSP has published the 1,900-page *Veterans Benefits Manual*, the leading practice guide on the subject.

NVLSP also is a veterans service organization recognized by the Secretary of Defense to assist veterans in the preparation, presentation, and prosecution of veterans' benefits claims. *See* 38 U.S.C. § 5902. NVLSP has represented thousands of veterans in proceedings before the Department of Veterans Affairs (VA), the Board of Veterans' Appeals, and the Court of Appeals for Veterans Claims (Veterans Court). In addition, NVLSP has filed numerous amicus briefs in this Court and others, seeking to provide assistance in cases that present issues of broad importance to veterans and the VA benefits system. *See, e.g.*, *Kingdomware Technologies, Inc.* v. *United States*, 136 S. Ct. 1969 (2016); *Henderson* v. *Shinseki*, 562 U.S. 428 (2011); *Shinseki* v. *Sanders*, 556 U.S. 396 (2009).

The Military Order of the Purple Heart, Inc., is a nonprofit veterans service organization formed for the protection and mutual interest of all who have been awarded the Purple Heart. The Order is chartered by Congress. *See* 36 U.S.C. § 140501. The Purple Heart is a combat decoration awarded only to those members of the armed forces of the United States wounded by a weapon of war in the hands of the enemy. It is also awarded posthumously to the next of kin in the name of those who are killed in action or die of wounds received in action.

Composed exclusively of Purple Heart recipients, the Order is the only veterans service organization com-

posed strictly of combat veterans. The Order conducts welfare, rehabilitation, and service work for hospitalized and needy veterans and their families. The Order's flagship program is its National Service Program, which exists to assist veterans and their families regarding benefits claims.

The National Law School Veterans Clinic Consortium is a collaborative effort of the nation's law school legal clinics dedicated to addressing the unique legal needs of U.S. military veterans on a pro bono basis. The Consortium's mission is, working with like-minded stakeholders, to gain support and advance common interests with the VA, Congress, state and local veterans service organizations, court systems, educators, and all other entities for the benefit of veterans throughout the country.

Protect Our Defenders (POD) is the only national nonprofit organization solely dedicated to ending the epidemic of rape and sexual assault in the military and to combating a culture of pervasive misogyny, sexual harassment, and retribution against victims. POD honors, supports, and gives voice to survivors of military sexual assault and sexual harassment—including service members, veterans, and civilians assaulted by members of the military. POD seeks reform to ensure that all survivors and service members are provided a safe, respectful work environment and have access to a fair, impartially administered system of justice.

The Service Women's Action Network (SWAN) is the leading national organization dedicated to service women and women veterans of the military. Of the more than 40,000 organizations serving the needs of service members, SWAN is the only one solely focused on the needs

of service women, women veterans, and other marginalized populations in the U.S. military.

Amici appear in support of petitioner to explain the harm that deference to VA's interpretations of its own ambiguous regulations inflicts on veterans seeking VA benefits. When courts apply such deference, it nearly always spells defeat for the veteran. That subverts the "special solicitude for the veterans' cause" that "Congress has expressed" and disserves those who have "performed an especially important service for the Nation, often at the risk of his or her own life." *Sanders*, 556 U.S. at 412.[1]

SUMMARY OF ARGUMENT

Under *Auer* v. *Robbins*, 519 U.S. 452 (1997), courts must defer to an administrative agency's interpretation of its own ambiguous regulation unless that interpretation is "plainly erroneous or inconsistent with the regulation." Although the *Auer* doctrine harms many citizens who interact with administrative agencies, it particularly harms veterans, in at least two ways.

A. Congress has long expressed a special solicitude toward veterans, including through the informal and nonadversarial nature of the VA claims-adjudication process. In recognition of Congress's appreciation for veterans' service to the Nation, this Court has held that

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[1] Pursuant to Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part and that no person other than amici or their counsel has made any monetary contributions intended to fund the preparation or submission of this brief. Petitioner has consented to the filing of this brief, and respondent has filed a letter with the Clerk consenting to the filing of all amicus briefs.

courts should construe veterans'-benefits laws in favor of veterans.

Application of *Auer* deference to VA's notoriously ambiguous regulations almost always spells defeat for the veteran. *Auer* thus upends the special solicitude owed to veterans by making it harder for veterans to obtain the benefits they earned. Courts, moreover, do not hesitate to find regulations ambiguous, and thus apply *Auer* deference, without engaging in serious regulatory construction. This reflexive deference amplifies *Auer*'s harmful effects on veterans. The result is unfortunate, if predictable: courts have issued numerous decisions of significant importance to veterans nationwide in which they construed regulations in VA's favor—and against veterans.

B. As this Court and commentators have recognized, *Auer* deference incentivizes agencies to promulgate ambiguous regulations. By doing so, agencies can effectively make policy after the notice-and-comment process has concluded by interpreting the ambiguity that the agency itself built into the regulation—unfettered by the protections that notice and comment are meant to provide. And that leeway pertains indefinitely, as an agency can use *Auer* to change the meaning of an ambiguous regulation at any time through informal and even non-public means. For those same reasons, *Auer* discourages agencies from revising ambiguous regulations once they have been promulgated.

The impact of these dynamics on veterans is particularly acute. VA's regulations are already notoriously confusing. The regulations use dense and winding language to describe otherwise simple concepts, and they lack any coherent, organized structure. *Auer* deprives VA of a key incentive to revise and reorganize these reg-

ulations: the threat of having its regulations construed against it during litigation. The result is predictable. VA purposefully retains ambiguous language in its regulations, and the agency still has not revised regulations that it promised to clarify almost 30 years ago.

ARGUMENT

AUER DEFERENCE HARMS VETERANS SEEKING DISABILITY BENEFITS FROM THE DEPARTMENT OF VETERANS AFFAIRS

A. Application Of *Auer* Deference To VA Regulations Harms Veterans

Auer v. *Robbins*, 519 U.S. 452 (1997), directs courts to defer to an administrative agency's interpretation of an ambiguous regulation unless that interpretation is "plainly erroneous or inconsistent with the regulation." *Id.* at 461 (citation omitted). Although courts and commentators have noted *Auer*'s flaws in many contexts, the doctrine is particularly problematic when applied to the regulations governing veterans' benefits.

1. Congress has long expressed a "special solicitude for the veterans' cause." *Shinseki* v. *Sanders*, 556 U.S. 396, 412 (2009). "A veteran, after all, has performed an especially important service for the Nation, often at the risk of his or her own life." *Ibid.* The veteran's burden also includes "the economic and family detriments which are peculiar to military service." *Johnson* v. *Robison*, 415 U.S. 361, 380 (1974) (citation omitted). In recognition of these sacrifices, Congress has chosen to favor "those who have been obliged to drop their own affairs to take up the burdens of the nation," *Boone* v. *Lightner*, 319 U.S. 561, 575 (1943).

Congress particularly displays its esteem for veterans in the system it created to adjudicate veterans' disability-benefits claims. The VA claims process "is designed to function throughout with a high degree of informality and solicitude for the claimant." *Walters* v. *Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 311 (1985). When a claim is filed, "the adjudicatory process is not truly adversarial." *Sanders*, 556 U.S. at 412. "[T]he veteran is often unrepresented during the claims proceedings," and "VA has a statutory duty to help the veteran develop his or her benefits claim." *Ibid.* "[I]n evaluating th[e] evidence" supporting the claim, "VA must give the veteran the benefit of any doubt." *Henderson* v. *Shinseki*, 562 U.S. 428, 440 (2011). And if VA denies a claim, the denial "has no formal res judicata effect." *Radiation Survivors*, 473 U.S. at 311. A veteran, in other words, "may resubmit [a previously denied claim] as long as he presents new facts not previously forwarded." *Ibid.*

Recognizing Congress's solicitude for veterans, this Court has "long applied the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *Henderson*, 562 U.S. at 441 (internal quotation marks and citation omitted). That is, when "interpretive doubt" exists in a statute or regulation governing veterans' benefits, the veteran's interpretation generally should prevail. *Brown* v. *Gardner*, 513 U.S. 115, 117-118 (1994). This canon helps to ensure that veterans'-benefits legislation is "liberally construed for the benefit of those who left private life to serve their country in its hour of great need." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).

2. Application of *Auer* deference to VA regulations erects systemic hurdles that contravene the "special solicitude" toward veterans that Congress and this Court have long mandated, perversely making it harder for veterans to obtain the benefits they earned.

a. When courts defer to VA's interpretation of its own regulations under *Auer*, it nearly always spells defeat for the veteran. Because Congress provided for judicial review only of VA's *denial* of benefits, 38 U.S.C. § 7252(a), deferring to VA's regulatory interpretation typically results in the court's adopting the interpretation that precludes the veteran's claim. *Auer* deference thus places a thumb on the scale against veterans when they seek judicial review of VA's decisionmaking. If the veteran's claim turns on the meaning of an ambiguous VA regulation, the denial likely will be affirmed.

That outcome is hard to square with the favor Congress and this Court have shown for veterans. Rather than favor the veteran, *Auer* effectively directs courts to construe regulations *against* the veteran. That improperly circumscribes judicial review of VA's claims-adjudication process and prevents veterans from obtaining the benefits they earned.

b. In addition, *Auer* deference incentivizes courts to avoid careful textual analysis in favor of reflexive deference, all to the detriment of veterans.

Under *Auer*, courts must perform a two-step analysis: determine whether the regulation is ambiguous, and, if it is, defer to the agency's reasonable interpretation of that regulation. *See Christensen* v. *Harris County*, 529 U.S. 576, 588 (2000). But the Veterans Court and the Federal Circuit—like many courts—often defer reflexively to VA under the second step in the

analysis without seriously engaging in the first. That is, instead of grappling with the regulatory text in earnest, courts sometimes will engage in a brief, halfhearted textual analysis before labeling a regulation ambiguous. This has led the courts, including the court of appeals in this case, to rule against the interest of veterans with little consideration of the governing regulations. *See, e.g.*, Pet. App. 14a-17a; *Smith* v. *Shinseki*, 647 F.3d 1380, 1384-1385 (Fed. Cir. 2011); *Kiersey* v. *Shinseki*, 486 F. App'x 114, 116 (Fed. Cir. 2012) (per curiam); *Urban* v. *Shulkin*, 29 Vet. App. 82, 88 (2017); *Pacheco* v. *Gibson*, 27 Vet. App. 21, 25-26 (2014) (en banc) (per curiam).

c. The flaws inherent in the *Auer* doctrine have manifested themselves with respect to various veterans' procedures and benefits, on which thousands of veterans who have honorably served this country depend.

i. This case acutely illustrates the point. Petitioner James Kisor, a Vietnam War veteran, seeks retroactive benefits for his service-connected post-traumatic stress disorder (PTSD). Pet. App. 2a. Whether Mr. Kisor can obtain retroactive benefits turns in part on the meaning of the word "relevant" in a VA regulation. *Id.* at 10a; *see* 38 C.F.R. § 3.156(c)(1). The Board of Veterans Appeals rejected Mr. Kisor's interpretation of the regulation, construing the regulation in VA's favor rather than his. *See* Pet. App. 6a-9a. The Veterans Court affirmed the Board's decision, and the Federal Circuit followed suit. *See id.* at 9a-10a, 14a-17a.

In doing so, the Federal Circuit deferred to VA's interpretation of the term "relevant" under *Auer*. Pet. App. 17a. After summarizing the parties' competing definitions of the term "relevant," the court concluded that the regulation was ambiguous merely because "neither party's position str[uck] [the court] as unreasonable."

Id. at 15a-17a. Although the court stated that "canons of construction do not reveal [the term's] meaning," the court did not actually apply any of those canons—including, most pertinently, the veterans canon. *Id.* at 15a.

The Federal Circuit's deferential interpretation of the reconsideration regulation has significant consequences not just for Mr. Kisor but for veterans as a whole. The right to have a claim reconsidered is vitally important to ensuring that veterans receive proper benefits.

That is especially true with respect to PTSD claims. PTSD is the third most prevalent service-connected disability, affecting over 950,000 veterans. *Veterans Benefits Administration Annual Benefits Report* 71 (2017) <benefits.va.gov/REPORTS/abr/>. VA itself has given PTSD special status among disability claims, providing special evidentiary rules for PTSD claims. *See* 38 C.F.R. § 3.304(f). Ironically, however, this may lead VA and military examiners to be reluctant to diagnose PTSD, for fear of giving veterans the procedural benefits that VA regulations afford them. *See* Dave Philipps, *Pattern of Misconduct*, Colorado Springs Gazette, Oct. 7, 2013 (exposing the pressure placed on Army psychologists to avoid diagnosing soldiers with PTSD to enable rapid discharge or the denial of benefits).

Veterans also have long been reluctant to admit their mental health problems, leading them to avoid seeking help or to hide their problems for months or even years. Nina A. Sayer et al., *A Qualitative Study of Determinants of PTSD Treatment Initiation in Veterans*, 72 Psychiatry: Interpersonal & Biological Processes 238, 238, 244-245 (2009). With records lost and witnesses no longer available, this delay can make it difficult to gather

already scarce evidence related to PTSD claims. *See* Direct Service Connection (Post-Traumatic Stress Disorder), 58 Fed. Reg. 29,109, 29,110 (May 19, 1993) (recognizing that PTSD can "involv[e] stressors which occurred under specific circumstances such as combat or being held as a prisoner-of-war where events can never be fully documented").

Even when veterans do seek help, the symptoms of PTSD are not always facially apparent. In fact, PTSD can be comorbid with other mental-health disorders, such as depression and anxiety. Nina K. Rytwinski et al., *The Co-Occurrence of Major Depressive Disorder Among Individuals with Posttramatic Stress Disorder: A Meta-Analysis*, 26 J. Traumatic Stress 299, 299 (2013) (concluding that 52% of individuals with current PTSD had co-occurring major depressive disorder and that military veterans demonstrated even higher rates of major depressive disorder). Conditions like these can be harder to connect to military service than PTSD—given the procedural benefits afforded to PTSD—causing veterans to labor under misdiagnoses for years, deprived of the help and benefits they so desperately need. *See* David Dobbs, *The Post-Traumatic Stress Trap*, Sci. Am. (Apr. 2009), at 68 ("PTSD is by far the easiest mental health diagnosis to have declared 'service-connected.'").

Mr. Kisor's case painfully invokes these difficult realities. In 2007, a medical professional diagnosed Mr. Kisor with PTSD, concluding that he had had PTSD since 1983, the year VA denied Mr. Kisor's original claim. *See* J.A. 38. But back in 1983—lacking relevant evidence of Mr. Kisor's combat experiences that it should have had before it—VA denied a diagnosis of PTSD, choosing instead to diagnose Mr. Kisor with a non-compensable personality disorder. *See* Pet. App. 3a.

This likely harmed Mr. Kisor in numerous ways, both tangible and intangible. It deprived Mr. Kisor of two decades worth of benefits for PTSD. During that time, Mr. Kisor likely labored under the misimpression that his struggles related to something he was born with, not something caused by his combat experiences in Vietnam, with untold effects on his mental health and the treatment (or lack thereof) that he obtained for his PTSD. And, for over two decades, Mr. Kisor had to live with the reality that his country did not believe him when he told it how terribly he was suffering as a result of "drop[ping] [his] own affairs to take up the burdens of the nation." *Boone*, 319 U.S. at 575.

The regulation at issue here is meant to provide veterans a straightforward means to remedy precisely this situation. *See* 38 C.F.R. § 3.156(c)(1). If VA had properly applied the regulation, that would not, of course, have rewound the clock on Mr. Kisor's decades of suffering, but it at least would have vindicated him and helped to alleviate the effects of that suffering. Mr. Kisor located evidence that is plainly "relevant" to what VA now admits—that Mr. Kisor has service-connected PTSD. *See* Pet. App. 4a. There is no telling how this evidence might have affected VA examiners' deliberations in the early 1980s, whether as to service connection or the diagnosis of PTSD itself.

Yet this is precisely the burden that VA claims the word "relevant" imposes on a veteran: to reconstruct the "but-for" world from decades prior, in light of the evidence she or he brings forward that VA should have considered at that time. *See* Pet. App. 17a. That is not a reasonable reading of "relevant," and veterans should not be forced to undertake such a counterfactual exercise in order to invoke the straightforward remedy provided

by VA regulations. If the Federal Circuit had not deferred to the agency's interpretation under *Auer*, it would have arrived at the correct result.

ii. *Auer*'s effects on veterans extend beyond the reconsideration regulation. The Federal Circuit also has used *Auer* to uphold limitations on the scope of benefits that veterans are eligible to receive. For example, in *Smith* v. *Nicholson*, 451 F.3d 1344 (Fed. Cir. 2006), Army veteran Ellis Smith reported tinnitus in both of his ears, but VA assigned him the same disability rating that would apply if only one ear was affected (10%). *Id.* at 1346. When Mr. Smith filed his claim for benefits, VA's Diagnostic Code listed tinnitus as a "disease of the ear," and VA's combined ratings table provided that differing disabilities arising from a single disease are to be rated separately unless otherwise provided. *See id.* at 1349. The Veterans Court relied on the plain text of these regulations to conclude that Mr. Smith was entitled to a "rating of 10% for each ear affected by a single case of tinnitus." *Id.* at 1347. But the Federal Circuit reversed, finding the regulations ambiguous. *Id.* at 1350. The court concluded that VA regulations did not expressly address whether a veteran suffering tinnitus in two ears has two, separate disabilities. *Ibid.* And rather than apply the veterans' canon or other standard tools of textual interpretation, the court simply deferred to VA's interpretation under *Auer*. *See id.* at 1350-1351.

Here again, the application of *Auer* had consequences far beyond Mr. Smith: the Federal Circuit itself recognized that its decision addressed an issue with "consequences well beyond th[e] case." *Id.* at 1348. For starters, tinnitus has been the most prevalent service-connected disability of all compensation recipients, affecting over 1.7 million veterans. 2017 *Veterans Benefits*

Administration Annual Benefits Report 71. Tinnitus continues to be the most prevalent service-connected disability of new compensation recipients as well. *Id.* at 70. What is more, the Veterans Court has begun to apply the Federal Circuit's holding to limit dual ratings for medical conditions other than tinnitus. *See Vilfranc* v. *McDonald*, 28 Vet. App. 357, 362-364 (2017) (temporomandibular joints). That holding can dramatically affect the amount of benefits a veteran receives. While ratings for multiple disabilities are not additive under VA's "Combined Ratings Table," the existence of an additional disability can substantially affect a veteran's ultimate disability rating, and thus compensation. *See* 38 C.F.R. § 4.25.

This harm affecting millions of veterans can be traced back to one source: the Federal Circuit's application of *Auer*. There are numerous reasons why *Auer* has no place in American jurisprudence. Its pernicious effect on veterans is a particularly compelling one.

B. The Incentives To Draft And Retain Ambiguous Regulations That *Auer* Creates Harm Veterans

The availability of *Auer* deference also incentivizes VA to draft and retain ambiguous regulations. VA's regulations governing compensation and pension benefits are notoriously confusing. *Auer* deference entrenches this problem. By removing the threat of plenary judicial review, *Auer* deference encourages VA to promulgate ambiguous regulations and discourages it from clarifying the ambiguous regulations it has previously promulgated. The result is that veterans are left to navigate a maze of impenetrable regulations to obtain the benefits they deserve.

1. As this Court has recognized, "[the] practice of deferring to an agency's interpretation of its own ambiguous regulations * * * creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit." *Christopher* v. *SmithKline Beecham Corp.*, 567 U.S. 142, 158 (2012). The reason why is obvious. Agencies cannot "anticipate all of the problems that may arise during the life of a general rule," and the political and monetary costs of rulemaking "rise with each increase in the [rules'] precision and clarity." John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 655 (1996). By purposefully enacting vague or ambiguous regulations, an agency can build "a bit of flexibility" into its regulations and "flesh[] * * * out [ambiguities] as the agency gains experience with implementing the regulatory program." Matthew C. Stephenson & Miri Pogoriler, Seminole Rock's *Domain*, 79 Geo. Wash. L. Rev. 1449, 1459 (2011). And because *Auer* deference authorizes "the agency [to] say what its own regulations mean (unless the agency's view is plainly erroneous), the agency bears little, if any, risk of its own opacity or imprecision." Manning, *supra*, at 655.

Auer's effects reach beyond just the initial drafting stage, however; *Auer* also discourages agencies from later clarifying vague regulations they previously promulgated. "[O]nce an agency has endured the considerable expense and turmoil of writing a rule, it has every incentive to leave well enough alone." Manning, *supra*, at 664 (citation and alteration omitted). *Auer* permits an agency to do just that, "adjust[ing] its policies, where possible, through reinterpretation rather than through amendment." *Ibid.* In other words, *Auer* encourages agencies both to draft opaque and ambiguous

regulations and then to retain those regulations rather than fix them.

These incentives are problematic because they invite agencies to shift policymaking from notice-and-comment rulemaking to "the implementation stage through other means, such as case-by-case adjudication." Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. Rev. 461, 552 (2003). This in turn "frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government." *Talk Am., Inc.* v. *Mich. Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring). As one leading scholar has put it, "the problem might be understood as an end-run around rulemaking in the extreme." Bressman, *supra*, at 552.

2. Here again, these broadly applicable incentives are of particular concern with respect to VA.

a. As VA itself has recognized, "[t]he Veterans Disability Compensation Program is the most complex disability claims system in the Federal government." *Hearing on the Department of Veterans Affairs Claims Adjudication and Pending Legislation Before the Committee, S. Comm. on Veterans' Affairs*, 106th Cong., 2d Sess. 2 (2000) (statement of Joseph Thompson, VA Under Sec'y for Benefits). To obtain disability benefits, "veteran claimants must be personally conversant and proficient with the arcane intricacies of an entitlement program that requires voluminous statutes, regulations, manuals, and circulars to administer." *Cook* v. *Principi*, 318 F.3d 1334, 1357 (Fed. Cir. 2002) (en banc) (Gajarsa, J., dissenting). The Veterans Court has described the layers of rules and regulations as a "confusing tapestry for the adjudication of claims." *Hatlestad* v. *Derwinski*, 1 Vet. App. 164, 167 (1991). Even senior VA officials in

charge of regulation policy lament that VA's regulations "have become progressively complex, difficult to understand, and sometimes ambiguous, causing uncertainty in the claim process and costly litigation." William L. Pine & William F. Russo, *Making Veterans Benefits Clear: VA's Regulation Rewrite Project*, 61 Admin. L. Rev. 407, 408 (2009); *see* William A. Moorman & William F. Russo, *Serving Our Veterans Through Clearer Rules*, 56 Admin. L. Rev. 207, 212 (2004).

History explains—to some extent—the ambiguity that plagues VA's regulations. VA has existed for almost 90 years, *see* Exec. Order 5,398 (July 21, 1930), and some of VA's regulations governing compensation have "origins in the 1910s." Pine & Russo, *supra*, at 408. In addition, until 1988, federal courts lacked jurisdiction to review VA's denial of veterans' benefits (except in the case of constitutional challenges). *Gilbert* v. *Derwinski*, 1 Vet. App. 49, 56 (1990); *see* Veterans' Judicial Review Act, Pub. L. No. 100-687, § 301(a), 102 Stat. 4105 (1988). Until then, VA stood in "splendid isolation." H.R. Rep. No. 100-963, 100th Cong., 2d Sess. 10 (1988). As this Court recognized, "because Congress took so long to provide for judicial review," VA's regulations enjoyed a largely "unscrutinized and unscrutinizable existence." *Gardner*, 513 U.S. at 122 (citation omitted).

Today, several problems afflict VA's regulatory regime. For starters, the regulations are poorly organized, which "obscures their intended meaning." Pine & Russo, *supra*, at 415 (providing examples). The regulations also use terms inconsistently, employing different words to express the same concept in different regulatory provisions. *Id.* at 414. VA's "convoluted expression of simple concepts," which "makes [these] already technical regu-

lations difficult to understand and apply," further exacerbates these problems. *Id.* at 416.

VA's attempts to reconcile this regulatory morass have not helped. Some regulations contain guidance for VA staff, but the guidance "is unclear in many cases" and "confuses those" who lack "extensive knowledge of the benefit program." Pine & Russo, *supra*, at 416. Other regulations are the subject of binding VA General Counsel opinions, but the opinions "have never been codified into VA's regulations." *Id.* at 419.

Veterans often confront this morass without legal representation. Because the benefits-application process "is designed to function throughout with a high degree of informality," *Radiation Survivors*, 473 U.S. at 311, "the veteran is often unrepresented during the claims proceedings," *Sanders*, 556 U.S. at 412. That is especially true at the initial stages of the adjudication process. *See Cook*, 318 F.3d at 1357. While attorney representation during the adjudication process is permitted, VA's regulations precluding attorney compensation during the initial stages of review hamper veterans' ability to obtain counsel to navigate VA's complex regulatory system. *See* 38 C.F.R. § 14.636.

These realities of the VA system can leave veterans hopelessly lost. Claimants performing regulatory research may find the regulations "difficult to locate and understand." Pine & Russo, *supra*, at 408. Others may find it hard to discern whether they have a viable claim. *Ibid.* The ambiguities tax VA claims examiners as well, who must determine how to apply vague regulations to a given set of facts. *See id.* at 409. This "drains time and money and increases the likelihood of inconsistent outcomes, even among substantially similar claims." *Ibid.*

Unfortunately, "the increased administrative burden on the VA and the growing thicket of VA rules have put paid to th[e] informality and collegiality" that the adjudication process was designed to embody. Jonathan Creekmore Koltz, Note, *Unstacking the Deck: In Defense of the Veterans Benefits, Healthcare, and Information Technology Act of 2006*, 17 Fed. Cir. B.J. 79, 91 (2007). "The present system, having lost its original character, seems exactly the sort of system in which attorneys would excel at aiding claimants to reach a just outcome." *Ibid.* Unrepresented and usually lacking legal expertise, however, veterans find the adjudication process confusing, tiring, and discouraging.[2]

b. *Auer* deference takes this already unmanageable state of affairs and makes it worse. Under *Auer*, VA can

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[2] The intractable delays that veterans face only further aggravate this dynamic. As the Federal Circuit recently noted, "the average time from [the initiation of a veteran's appeal of a benefit denial] to issuance of a [Board of Veterans Appeals] decision is over five years." *Martin* v. *O'Rourke*, 891 F.3d 1338, 1341-1342 (Fed. Cir. 2018). Mr. Kisor's case illustrates the point: he initiated his claim for reconsideration in June 2006, Pet. App. 4a, and filed his Notice of Disagreement in November 2007, *id.* at 5a. The Board of Veterans Appeals did not issue its decision until April 2014, more than *seven* years later. *Id.* at 26a. And nearly five more years after that, Mr. Kisor's case is still winding its way through the courts. As Judge Moore aptly noted:

> It takes on average six and a half years for a veteran to challenge a [VA benefits] determination and get a decision on remand. God help this nation if it took that long for these brave men and women to answer the call to serve and protect. We owe them more.

Martin, 891 F.3d at 1352 (Moore, J., concurring).

promulgate vague regulations now and flesh out the specifics later, particularly through the case-by-case adjudication of benefits claims. The availability of *Auer* deference also robs VA of any incentive to clarify the myriad ambiguous regulations promulgated long ago: vagueness inures to VA's benefit, and implementing new rules takes significant time and effort. So long as *Auer* shields VA's regulations from plenary judicial review, the status quo will remain.

This concern is not merely academic. The following examples reveal how *Auer* incentivizes VA to promulgate vague rules and removes incentives for it to cure ambiguities in existing regulations.

i. In September 2006, Army veteran Eric C. Cantrell applied for benefits for a service-related digestive disorder that, during flare-ups, required him to visit the restroom 20 times a day. *Cantrell* v. *Shulkin*, 28 Vet. App. 382, 384-385 (2017). Due to this condition, Mr. Cantrell had to resign from his position as a highway patrolman. *Id.* at 385. Mr. Cantrell was then hired as a park ranger, but his employer had to provide extensive accommodations to allow him to continue in his position. *Ibid.* Even with accommodations, Mr. Cantrell's condition " 'ma[de] it difficult for him to perform his job.' " *Ibid.* (quoting 2011 opinion of VA hearing examiner).

During the claims-adjudication process, Mr. Cantrell contended that he was entitled to a disability rating of total disability based on individual unemployability. *Cantrell*, 28 Vet. App. at 385. Under VA regulations, a veteran is entitled to that rating if he or she is "unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities." 38 C.F.R. § 4.16(a). The relevant regulation states that "[m]arginal employment shall not be considered substantially gainful

employment" and provides that marginal employment "generally shall be deemed to exist" if the veteran's annual income falls below the federal poverty threshold. *Ibid.* If the veteran's annual income exceeds the poverty threshold, however, marginal employment still "may also be held to exist[] on a facts found basis," including "employment in a protected environment such as a family business or sheltered workshop." *Ibid.* The regulation does not define "employment in a protected environment."

Mr. Cantrell asserted that his work as a park ranger qualified as "employment in a protected environment" given the accommodations necessary to allow him to work there. *Cantrell*, 28 Vet. App. at 386. In 2015, however, the Board of Veterans' Appeals denied his claim for total disability. *Id.* at 386-387. The Board concluded that Mr. Cantrell's employment as a park ranger was "substantially gainful" despite the accommodations. *Id.* at 387. The Board added that Mr. Cantrell's environment was not "marginal employment akin to employment in a protected environment" because, with the accommodations, he could perform full-time work. *Ibid.* Mr. Cantrell appealed to the Veterans Court. *Ibid.*

The court ordered supplemental briefing on the meaning of VA's regulation governing total disability based on individual unemployability. Per Curiam Order 1-2, No. 15-3439 (Vet. App. filed Dec. 1, 2016). The court asked VA (1) for examples of "marginal employment" when earned annual income exceeds the poverty threshold; (2) for the agency's definition of "employment in a protected environment"; and (3) whether the court should defer to that definition. *Ibid.*

Contrary to the court's order, VA did not explain what types of employment qualified as "marginal" if in-

come exceeded the poverty threshold. Instead, VA argued that this undefined language "reflect[ed] the Secretary's intent to defer to the Agency's factual determination of whether marginal employment exists" on a case-by-case basis. VA Supp. Br. 7, No. 15-3439 (Vet. App. filed Dec. 16, 2016); *see id.* at 5. "VA may choose to use abstract language," the agency asserted, "so that the regulation is drawn broadly to allow flexibility in its application to new and unforeseen circumstances." *Id.* at 7. To the extent the appeals court did not find the Secretary's intent to defer to the agency's fact-finding plain from the face of the regulation, VA asked the court to defer to its interpretation under *Auer*. *See id.* at 7-8 (citing *Savage* v. *Shinseki*, 24 Vet. App. 259, 266 (2011), which in turn cites *Auer*).

VA took a similar tack regarding the definition of "employment in a protected environment." The agency asserted that it "ha[d] purposely chosen not to prescribe a precise definition of 'protected environment,' allowing the factfinder to make this determination on a case-by-case basis." VA Supp. Br. 12. And because "[t]he definition * * * is not clear from the plain language of the regulation," VA asked the court to "defer to [its] interpretation that this is a factual determination to be made on a case-by-case basis." *Id.* at 12-13.[3]

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[3] The government's certiorari-stage brief in this case acknowledged that VA took a similar approach here as to the meaning of "relevant," noting that the Board "did not articulate a comprehensive definition of the term" and instead concluded that the records "were not 'relevant' in the circumstances of this case." U.S. Br. in Opp. 13.

VA's actions in *Cantrell* exemplify the concern that this Court and commentators have expressed regarding *Auer* deference. *See* pp. 15-16, *supra*. VA expressly admitted that it left key substantive terms in a regulation undefined so that it could "preserve the Agency's role in making these determinations on a case-by-case basis." VA Supp. Br. 11. That, of course, is just another way of saying that VA avoided making policy through notice-and-comment rulemaking to give itself flexibility to make law and policy during adjudications. *Cf.* Bressman, *supra*, at 552 (observing that *Auer* "allows agencies to issue vague regulations only to make the actual policy at the implementation stage through other means, such as case-by-case adjudication").

The appeals court in *Cantrell* ultimately did not defer to VA's litigating position. The court reasoned that, because VA chose not to define the relevant terms, there was nothing to which to defer. *See Cantrell*, 28 Vet. App. at 390-391. But it is far from clear that the outcome would have been the same in other courts. VA's decision at a minimum involved application of its own regulation to Mr. Cantrell's case, which some courts have suggested *would* warrant *Auer* deference. *See, e.g.*, *Brodsky* v. *U.S. Nuclear Regulatory Comm'n*, 578 F.3d 175, 182 (2d Cir. 2009); *Sigma-Tau Pharm., Inc.* v. *Schwetz*, 288 F.3d 141, 146 (4th Cir. 2002); *Consol. Rail Corp.* v. *ICC*, 43 F.3d 1528, 1532 (D.C. Cir. 1995). *But see RLC Indus. Co.* v. *Comm'r*, 58 F.3d 413, 415-416 (9th Cir. 1995) (refusing to defer to agency's application of regulation to facts); *Gose* v. *U.S. Postal Serv.*, 451 F.3d 831, 839 (Fed. Cir. 2006) (similar).

In any event, whether or not the Veterans Court properly declined to apply *Auer* deference under then-existing law is not the point. VA's uncharacteristic can-

dor reveals that VA will in fact "promulgate vague and open-ended regulations that [it] can later interpret" if permitted to do so. *Christopher*, 567 U.S. at 158. And then it will use *Auer* to give it the space it needs to accomplish that impermissible goal. In this way, *Auer* deference particularly harms veterans.

ii. VA's Regulation Rewrite Project provides another example of the poor incentives that *Auer* deference creates for VA. In 2001, the Secretary of VA established the VA Claims Processing Task Force, a group tasked with "recommend[ing] specific actions that the Secretary could initiate within his own authority * * * to relieve the current veterans' claims backlog and make claims processing more efficient." Dep't of Veterans Affairs, Claims Processing Task Force, *Report to the Secretary of Veterans Affairs* 1 (Oct. 2001) <tinyurl.com/VA-task-force-report> (VA Task Force Report). The Task Force issued a report outlining its recommendations later that year. *See ibid.*

Among other things, the Task Force identified as an "immediate priority" the relocation of "all regulatory material in regulations that are rewritten and reorganized in a logical, coherent manner." VA Task Force Report, *supra*, at 87. The Task Force observed that, in testimony before Congress 20 years earlier, VA had "promised to clarify" its regulations. *Ibid.* "The problems identified 20 years ago remain today," the Task Force observed, "and the promise to correct them is unfulfilled." *Ibid.* The Task Force added that VA's regulations were "[c]onfusing to even experienced claims examiners" and were "particularly challenging to the many new [Veterans Benefits Administration] employees." *Ibid.*

In 2002, VA began to implement the Task Force's recommendation through the Regulation Rewrite Project. *See* Moorman & Russo, *supra*, at 209. VA issued the first Notice of Proposed Rulemaking (NPRM) in 2004 to revise its compensation and pension regulations. *See* Service Requirements for Veterans, 69 Fed. Reg. 4,820 (Jan. 30, 2004). Over the next nine years, VA issued 19 similar notices relating to other subparts of these regulations. *See* VA Compensation and Pension Regulation Rewrite Project, 78 Fed. Reg. 71,042, 71,042 (Nov. 27, 2013). The agency's plan was that, after receiving comments on each subpart, VA would promulgate a single final NPRM incorporating all of the revised regulations into a new part of the Code of Federal Regulations. Pine & Russo, *supra*, at 410.

VA published the combined NPRM in 2013 and reiterated its intent to publish the regulations as a new, standalone part. *See* VA Compensation and Pension Regulation Rewrite Project, 78 Fed. Reg. at 71,042. VA indicated that, by organizing the new part "so that most provisions governing a specific benefit are located in the same subpart," "claimants, beneficiaries, and their representatives, as well as VA adjudicators, [could] find information * * * more quickly." *Id.* at 71,044. VA recognized that "the validity of the new part * * * may be challenged in the short-term," but it expressed its belief that "rewriting and reorganizing these regulations will be beneficial to veterans." *Id.* at 71,045.

After nearly two decades of work (on a problem VA had recognized a decade before that), VA abruptly reversed course in 2018. The agency rescinded the 2013 NPRM and now proposed to revise its existing regulations "over a number of years" to incorporate the changes it had previously proposed. VA Compensation

and Pension Rewrite Project, 83 Fed. Reg. 14,803, 14,803-04 (Apr. 6, 2018). VA cited administrative constraints to explain why it was not adopting the proposed new part: "[t]his multi-year approach minimizes [the] disruption" that would arise from implementing a complete new set of regulations. *See id.* at 14,804. VA indicated that some changes to the existing regulations were "already underway" but did not provide a timeline for future action. *Ibid.* Although it is unclear how VA will proceed from here, VA's three decades of inaction on this problem do not give cause for hope.

Auer further suffocates that hope. For all of the reasons explained above, *Auer* incentivizes VA to keep in place indefinitely its poorly organized and often-ambiguous regulations. Had courts been construing ambiguities in veterans' favor rather than in VA's favor for the past 30 years, *see* p. 7, *supra*, VA would have been strongly motivated to rewrite its rules to remove such ambiguities. And it would have had to do so in the sunlight provided by notice-and-comment rulemaking.

Auer deference creates the opposite incentive. It allows VA to maintain the status quo and invoke *Auer* deference when ambiguities arise, rather than revising its regulations for the long-term benefit of veterans, their representatives, and VA claims examiners. No matter how long VA waits to revise its regulations (if it does so at all), the agency has little cause for concern so long as *Auer* stands: "the agency bears little, if any, risk of its own opacity or imprecision." Manning, *supra*, at 655. A decision overruling *Auer* may finally spur VA to fix its regulations "in dire need of revision and organization." VA Task Force Report 87.

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Auer deference deprives veterans of the benefits they deserve. It encourages courts to defer to VA's interpretation of its own regulations and thus to construe the regulations against the veteran's interests. It also encourages VA to promulgate vague regulations and discourages it from fixing the many problems plaguing its existing regulatory regime. These issues reach far beyond Mr. Kisor himself. They affect millions of veterans across this Nation. The Court should overrule *Auer*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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